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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 38.

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, Trustees of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioners,

—against—

CONNECTICUT RAILWAY & LIGHTING COMPANY,

Respondent.

BRIEF FOR PETITIONERS.

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October 4, 1940.

The Lawyers Press, N. Y. C.

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BRIEF FOR PETITIONERS.

Opinions Below.

The District Court's opinion (R. 265-290) is not officially reported. The opinion of the Circuit Court of Appeals is reported at 109 Fed. (2d) 568 (R. 293-301).

Jurisdiction.

The order for mandate was entered on March 2, 1940. Petition for certiorari was filed on March 27, 1940 and was granted on April 22, 1940. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 25(c) of the Bankruptcy Act as amended.

Questions Presented.

In adjudicating a landlord's claim for damages for rejection of a lease in the reorganization of a railroad under Section 77 of the Bankruptcy Act, as interpreted by this Court in *Connecticut Railway and Lighting Company* v. *Palmer* (305 U. S. 493):

1. May damages be awarded for a portion of the unexpired term of the lease without any proof as to the balance of the term?
2. May an appellate court allow damages on the basis of evidence which the trial judge has held does not satisfy his mind?
3. Does the evidence in this case prove damages with the requisite degree of certainty?

Statute Involved.

The statute involved is Section 77, subsection (b) of the Bankruptcy Act (11 U. S. C. A., Section 205), the pertinent language of which is:

> "* * * In case an executory contract or unexpired lease of property shall be rejected, * * * any person injured by such * * * rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings * * *."

Opinion of This Court.

The meaning of the quoted portion of the statute was interpreted by this Court in its previous opinion in the

instant case (*Connecticut Railway and Lighting Company v. Palmer,* 305 U. S. 493). It said:

"* * * the changes of the Committee on the Judiciary in the wording of the Coordinator's draft, by which 'actual' was inserted before 'damage' and 'determined in accordance with principles obtaining in equitable proceedings' added as a guide, were intended to call emphatically to the attention of those administering the reorganization section the requirement that only those damages susceptible of definite proof should be allowed. We cannot read a limitation on damages into the language as enacted * * *" (p. 502).

"* * * The measure of damages * * * (is) the present value of the rent reserved less the present rental value of the remainder of the term" (p. 504).

"Judges in equitable proceedings will have the advantage of evidence in applying the usual rules as to the measure of damages. It is well understood that such evidence must show damages to reasonable certainty. Mere 'plausible anticipation' does not merit consideration nor are flights into the realm of pure speculation entitled to be treated as evidence. The determination of the amount to be allowed as the damage will be based on evidence which satisfies the mind" (p. 505).

Statement.

The respondent in 1906 leased to the predecessor of The New York, New Haven and Hartford Railroad Company (herein called the New Haven) certain street railway properties in Connecticut for a term of 999 years (R. 5-30). On October 23, 1935, the New Haven filed a petition for reorganization under Section 77 of the Bankruptcy Act

(R. 1). Petitioners are the trustees of its property appointed by the bankruptcy court. On December 18, 1935, the trustees, with the court's approval, rejected the lease of respondent's property (R. 266). On November 16, 1936, respondent repossessed the property (R. 268).

From the beginning of the lease until its rejection The Connecticut Company, a wholly owned subsidiary of the New Haven, had operated respondent's property as part of a much larger system of street railway properties owned by The Connecticut Company. Until the lease was rejected there had never been any segregation of either operations or accounts as between the leased and the owned properties (R. 268). Under order of the court separate records of the operation of respondent's property were kept from shortly after the beginning of the reorganization proceedings until repossession. Since repossession respondent has operated its own property as a separate system and has kept its own records (R. 268). At the time of repossession the leased premises consisted partly of trolley properties and partly of bus properties. Immediately following repossession respondent converted it all into busses (R. 268).

Following rejection of the lease respondent filed various claims against the New Haven estate. The only one here involved is that for damages for loss of future rent due to rejection of the lease. On that claim the District Court at the first trial allowed damages in the amount of the difference between the rent reserved in the lease and the net earnings of the property during the period of the reorganization proceedings.* After affirmance by the

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* The actual order awarded damages up to the date of the original hearing and provided that respondent might apply for a subsequent hearing, to be held as late in the reorganization proceedings as the Court would permit, to determine damages until the date of such final hearing (R. 38).

Circuit Court of Appeals (95 Fed. (2d) 483), this Court reversed and remanded the case to the District Court for further proceedings in accordance with this Court's opinion (305 U. S. 493, 506).

A second trial was held before the District Court. Respondent was allowed to introduce all the evidence which it offered. The court held that the record was insufficient to permit recovery of any damages under the provisions of the statute as interpreted by this Court. It therefore dismissed the claim (R. 265-290). Respondent appealed and the Circuit Court of Appeals reversed the decision and awarded damages in the sum of $4,411,837.61, based on the difference between rent and earnings for the three years which had elapsed between rejection and the hearing and the difference between rent and estimated earnings for eight years into the future, all discounted back to January 1, 1936 (109 Fed. (2d) 568; R. 300).

Petitioners sought review on the ground that the decision of the Circuit Court of Appeals was in conflict with this Court's opinion.

Summary of Argument.

1. Respondent's right to recover damages for the rejection of the lease depends upon whether it will be injured by the destruction of the *entire* remainder of the term. It cannot waive, nor can the courts waive for it, the latter part of the term. It conceivably might, intentionally or through failure to prove the amount, waive *damages* for the latter part of the term if it had proved that it would surely be damaged during that part. It could not recover for a loss in the early part of the term without proving that there would be no offset to that loss during the later part.

2. The trial judge found that the evidence of rental value was insufficient to satisfy his mind. Under the peculiar language of Section 77, as interpreted by this Court, the appellate court should give greater than ordinary weight to such a finding and should not reverse it except for manifest errors of law.

3. The evidence in this case does not "show damages to reasonable certainty".

Argument.

1. Damages Cannot be Awarded for a Portion of the Unexpired Term of the Lease in Disregard of the Balance.

Under Section 77 a landlord whose lease has been rejected gets his property back. From that time until the end of the term of the former lease he has the use of the property, that is, he enjoys its rental value, instead of receiving the rent called for in the lease. Whether he is injured by the rejection depends upon whether such rental value is less or greater than such rent.

Whenever a lease is rejected it is likely that the rental value of the property is currently less than the rent reserved. Otherwise it would probably not have been rejected. The early part of the unexpired term is therefore often a period when the landlord will receive less for the use of the property than he would have received under the lease. This, however, does not necessarily prove that he has been injured by the rejection. The use of the property in the later years of the term may prove to be of greater value than the rent reserved in the lease. He may actually be better off through having his property back. If the lease has only a short time to run, a condition of economic depression existing at the time of

rejection may well last throughout the entire remainder of the term. But if there is a long unexpired term, the reverse may be true.

Therefore, the question whether a landlord has been injured by rejection of his lease is one which depends for its answer upon what will happen during the entire unexpired term, not merely the first part of it. To decide it on the basis of an initial loss and disregard the latter portion of the term is equivalent to finding that the rental value of the property will not during that period equal the rent. Such a finding cannot be made without proof. To say that proof may be dispensed with because it is too difficult is either to say that the court may remake the contract for the parties by shortening the term of the lease or that the burden of proof shifts when it becomes too heavy to bear. Neither, we submit, is true.*

As the landlord is seeking damages for the rejection of his lease, it is necessarily the loss of that very lease, not a different one, which must be considered. What he would have lost if a lease for some other term had been rejected is of no relevance. The parties created certain rights by entering into the contract. It is those rights which have been destroyed, not different rights based on another contract which they might have made, but didn't. Damages for the destruction of a right are measured by the value of that right, not by the value of some other right. The landlord can, therefore, recover only if he has been injured through losing the difference between rent and rental value for the *entire* remainder of term for which he bargained.

This is recognized in the decisions dealing with claims for loss of future rent. It is referred to by this Court

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* Both of the lower courts held that the burden of proof is on respondent (R. 281-286, 298).

as the "uniform" measure of damages (305 U. S., p. 504) and as "a method of liquidation familiar and fair" (*City Bank Co.* v. *Irving Trust Co.*, 299 U. S. 433, 443). It is the measure and method which were prescribed for this very landlord when this Court defined the measure of damages as

> "the present value of the rent reserved less the present rental value of the remainder of the term" (305 U. S., p. 504).

If there could be any doubt as to what was meant by "the remainder of the term" it is dispelled by the statement that "Here there is a remainder of 969 years" (305 U. S., p. 505).

On rescript the District Judge interpreted this Court's opinion as holding that the cause of action was "indivisible and comprehensive damages for the entire unexpired term" (R. 287).

The Circuit Court of Appeals, on the other hand, apparently felt that this Court could not have meant to require proof for the entire balance of the term because

> "damages for 969 years cannot be imagined, much less proved" (R. 297).

Although it recognized that the measure of damages is the present worth of rent less rental value "for the balance of the term", it held that

> "a lessor may recover only so much of his damages as he is able to establish with reasonable certainty. In effect, the law for purposes of damages treats a lease with 969 more years to run as if it were only for a term within the reach of fairly definite forecast; the unpredictable stretch beyond is disregarded" (R. 298).

That this Court was aware of the problem involved in proving damages for rejection of long-term leases but nevertheless intended that the proof should cover the whole term is, we respectfully submit, indicated in its comments that

> "The difficulties of proof are well recognized" (305 U. S., p. 504),

and

> "the uncertainty as to the loss entailed by abrogation of leases * * * (grows) greater as the remainder of the term lengthens" (p. 505).

The uncertainty of loss and the difficulties of proof would be no greater under a long lease than a short one if proof as to the latter part of the long term were unnecessary. Moreover the case cited to illustrate "the difficulties of proof" was one in which claims under 999 year leases were disallowed on the ground that damages had not been established with the requisite degree of certainty (*Pennsylvania Steel Co.* v. *New York City Railway Co.*, 198 Fed. 721, 759).

As we have said, the question whether the landlord has been damaged by rejection depends on whether he will receive less from the use of his property than he would have received under the lease. This cannot be shown by evidence which relates only to a portion of the unexpired term and ignores the balance, especially where, as here, the ignored balance constitutes 99% of the whole.

The length of the unexpired portion of the term is one of the facts on which the right to damages depends. It cannot be altered by disregarding a portion of the term. If the claimant should show that it would be injured during the first part of the remainder and would not recoup any part of such injury thereafter, it might be permitted to recover the damages proved for the early years and

ignore the later years. That would mean merely that it had waived something the right to which it had established, but the amount of which it had failed to prove. But the later years cannot be "disregarded" in the sense that damages for the early years may be awarded without proof that there will be no offset during the later years.

The Circuit Court of Appeals seems to have overlooked this distinction. In disregarding "the unpredictable stretch" it was not permitting the landlord to waive damages the right to which had been proved. On the contrary, it was enabling him to recover for early losses without showing that "the unpredictable stretch" would not wipe them out and make him whole. It did not find that he would be injured by the loss of the entire term. It merely said:

> "For the purposes of the age in which we live, we know that the rejection of the lease caused a severe loss to the claimant" (R. 297).

Even if this sort of finding might have justified "disregarding" the balance of the term of a lease which did not extend beyond "the age in which we live", it could not, in the absence of a finding that there would be no offsetting gain in later "ages" of the term, justify disregarding any portion of the term of *this* lease. Especially is this true in the face of the trial court's finding that

> "There is no basis for assuming that the demised properties * * * will never throughout the term produce earnings greater than those to be expected in the next forty years or so" (R. 279).

It may well be that landlords of very long leases will often find it impossible to prove any "actual" loss from

the rejection of the remainders of their terms. That, as this Court has indicated, is a difficulty inherent in such leases. But it has its compensations. Landlords stand in a somewhat special position among the creditors. Unlike other creditors, they get their property back. The longer the remainder of the term, the more they have returned to them and the greater the possibility of their being able at some time during the unexpired term to make a more profitable disposition or use of it. A 999 year lease, when made and for centuries afterwards, is practically a fee. On rejection during the early part of the term the lessor not only in effect gets back the fee, but also may assert claims for breaches of covenant including one for loss of rent over a period of time which, from the point of view of the present, is equivalent to perpetuity.

The only case cited by the Circuit Court of Appeals as authority for not requiring proof as to the latter portion of the unexpired term is its own decision affirming an allowance of damages to the Old Colony Railroad for rejection of a lease by the New Haven Trustees. Judge Hincks had awarded damages on the same basis that he had applied in the first trial in this case. In upholding that allowance the Circuit Court of Appeals said:

> "Even if we were free, we should not have sustained the full extent of the plaintiff's claim; it is a fanciful notion that one may forecast the future value of a railroad half a century hence. We need not say whether, if the matter were for the first time before the court as now constituted, a majority might have been disposed to allow future damages for a period of say five or ten years, on the theory that present estimates for as long as that might have some validity." (*Old Colony Railroad Co.* v. *N. Y., N. H. & H. RR. Co.*, 98 Fed. (2d) 670, 672.)

That decision was reversed on certiorari and the case was remanded for further proceedings in conformity with this Court's opinion in the instant case (*Palmer* v. *Palmer*, 305 U. S. 578). Thus, the only authority cited by the Circuit Court of Appeals for "disregarding" part of the term is a suggestion—not even a dictum—in one of its own decisions in a case which was subsequently ordered retried on the basis of the opinion in this case. Obviously that suggestion throws no light on the meaning of the language later used by this Court.

The Circuit Court of Appeals for the Second Circuit has never before, so far as we have been able to discover, departed from the universal rule* that damages for loss of future rent will not be awarded for part of the unexpired term without proof of damage for the whole term. The *Pennsylvania Steel Company* cases are the leading examples of its attitude. The doctrine was reiterated as recently as 1933 in *In re Wise Shoes, Inc.* (64 Fed. (2d) 1023) when Circuit Judges L. Hand, Swan and A. N. Hand affirmed a decision by then District Judge Patterson who, incidentally, was the Circuit Judge who wrote the opinion in the instant case. In the *Wise Shoes* case, Judge Patterson had said:

"* * * it was impossible at the time of bankruptcy to

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* This is to be distinguished from the doctrine that rent or damages may be recovered up to commencement of the action in cases where the lease has not been terminated by rejection or otherwise, and from cases where the lease contained a covenant to pay deficiencies which the court interprets as giving rise to a cause of action on each rent day. In such cases the claim accrues as each rent period comes along. In proceedings where damages are sought for loss of future rent, however, we have found only one case in which any court has allowed the loss for a part of the term without proof as to the balance (*People ex rel. Nelson* v. *West Town State Bank*, 299 Ill. App. 242). That case was reversed on further appeal on the ground that in the absence of a covenant for damages there could be no recovery in a receivership (373 Ill. 106).

say whether there would be any deficiency over the next seventeen years *taken as an entirety.* Probably there will be a loss for some years, *but who can say that any such loss will not be swallowed up in the later years of the term?*" (2 Fed. Supp. 521, 523). (Italics ours.)

When this case came before this Court previously it was the allowance of damages for the early part of the unexpired term and the ignoring of the later part that led to its reversal. Damages had been awarded for a period roughly equal to the time required for reorganization on the theory that "actual" injury meant accrued injury. That theory had at least the merit of leaving nothing to prophecy. It eliminated all speculation as to future values and all uncertainty as to where to divide the term. But even so this Court rejected it on the ground that the statute did not create a new measure of damages. If it were proper to split the term at all, surely the trial court's original theory was fairer and less arbitrary, and could more readily have been justified under the statute, than the measure now proposed by the Circuit Court of Appeals.

2. As the Mind of the Trial Judge Was Not Satisfied As To The Evidence of Damage, The Appellate Court Should Not Have Awarded Damages on the Basis of That Evidence.

Judge Hincks ruled that

> "the evidence of claimant and debtor alike lacks that 'reasonable certainty * * * which satisfies the mind'" (R. 282).

The action of the Circuit Court of Appeals in awarding damages on the basis of the evidence which Judge Hincks had thus characterized indicates that it interpreted this

Court's opinion as encouraging the appellate court to draw its own inferences from the record even where the trial court had held the evidence inadequate. We respectfully suggest that the decision of this Court should not be so understood.

The problem before this Court was to construe the meaning of rather obscure words added to Section 77 by the amendment of 1935. That section as originally enacted in 1933 made provable a "claim for future rent" but said nothing about the method of proof or measure of damages. An amendment was introduced in 1935 which provided that in case of the rejection of a lease

> "any person injured by such * * * rejection, shall * * * be deemed to be a creditor to the extent of such damage or injury" (H. R. 6249, 74th Congress, First Session).

The draft bill containing this language was referred to the House Committee on Judiciary which changed the words "such damage or injury" to "the actual damage or injury determined in accordance with principles obtaining in equity proceedings".

This Court held that the substituted words were not intended, as the lower courts had thought, to establish a limitation upon damages or a new measure of damages, but that they related to the manner of proving damages. It pointed out that in other sections of the Bankruptcy Act specific limitations of one year's rent or three years' rent had been prescribed in bankruptcy and general corporate reorganization proceedings, but that Congress had not provided such a measure in railroad reorganizations. The added words

> "were intended to call emphatically to the attention of those administering the reorganization section the

requirement that only those damages susceptible of definite proof should be allowed" (305 U. S., pp. 499-502).

In further explanation of the sort of proof necessary to establish damages for loss of future rent the Court stated that the evidence in this sort of case "must show damages to reasonable certainty", that "plausible anticipation" and "flights into the realm of pure speculation" must not be considered and that "the determination of the amount to be allowed as the damage will be based on evidence which satisfies the mind" (305 U. S., p. 505).

Whatever the exact meaning of the change in the statute there can be no doubt that its general purpose was to protect the other creditors in a reorganization from disproportionate awards to those who, like landlords or other executory contractors, receive back their property. Congress had recognized the necessity for such protection in the express limitations on damages in other sections of the Bankruptcy Act. This Court had also recognized such necessity when it said:

> "*Whatever courts,* in the absence of a statutory formula, *might feel compelled to adopt as the measure of damage* in such a case, we cannot hold that Congress could not reasonably find that an award of the full difference between rental value and rent reserved for the remainder of the term smacks too much of speculation and that a uniform limit upon landlords' claims will, in the long run, be fair to them, to other creditors, and to the debtor" (*Kuehner* v. *Irving Trust Company,* 299 U. S. 445, 454). (Italics ours.)

The words "such damage or injury" obviously left the door wide open to recovery of any loss which a landlord could prove. No amendment to those words was necessary

to insure that right. Proof would, of course, have had to be made in accordance with the usual rules of evidence, but no limit on damages and no change in procedure or character or proof was indicated. Then Congress changed "such" to "the actual". In so doing it was not making an empty gesture. "Significance and effect shall, if possible, be accorded to every word" (*Ex Parte Public National Bank of New York*, 278 U. S. 101, 104).

In thus calling "emphatically to the attention of those administering the reorganization section the requirement that only those damages susceptible of definite proof should be allowed", Congress was clearly seeking to define and limit a landlord's right in some manner. If it was not prescribing a new measure of damages it must have been either setting up a different standard of proof from that applicable in other cases or directing the courts to give a different significance and weight to the evidence. Certainly, it was not merely reminding the courts to do what they must do under any statute and in every case, namely, to obey the rules of evidence and procedure.

The word "actual" clearly imports that because of the danger that speculative elements might enter into the otherwise unlimited determination of a landlord's damages, Congress intended to prescribe a requirement that such damages must be proved in such fashion as to satisfy the court that they would certainly be suffered. If any doubt existed they could not be allowed. Therefore, if the trial judge's mind was not satisfied his finding that the evidence was insufficient should be given the weight and significance which attach to a finding of fact by a jury or by an administrative tribunal and should not be reversed except for an error of law.

We believe that when this Court said that the determination of damages must be based "on evidence which satisfies the mind", it meant that if the evidence is of a sort that a reasonable man, sitting as a trial judge and acting

properly in his judicial capacity, finds insufficient to satisfy his mind, the appellate court should not award damages on the basis of that evidence. In other words, it should not draw new and different inferences from the record which the trial court declined to draw. And if the judge who heard and saw the witnesses and is familiar with the entire background of the proceeding is not satisfied, the appellate court should not rule that the evidence "satisfies the mind".

We therefore submit that the appellate court's finding that Judge Hincks was "unduly critical" of the evidence, is not sufficient to warrant a reversal of his decision.

3. The Evidence in this Case does not "Show Damages to Reasonable Certainty".

Even if it were appropriate for the appellate court to reverse a finding by the trial judge that the evidence does not satisfy his mind, it could not properly find that damages have been proved in this record with the requisite degree of certainty.

The only evidence contained in the record which could conceivably throw any light on the subject of rental value consists of the past earnings, actual or estimated,* of the leased property, its book value before rejection, the statement that the demised trolley properties were in part converted to busses prior to repossession in November, 1936, and wholly so converted shortly thereafter, and the value on December 31, 1938, of the property then belonging to the respondent.

No evidence was offered of the character of the terri-

* As no separate accounts for respondent's property were kept prior to rejection of the lease, the earnings for all periods before December 18, 1935, are based on an estimated segregation subsequently prepared. Such estimated segregation was carried back through 1921 (Ex. Y-1, Y-2, Y-4). Prior to that date the earnings are shown only for The Connecticut Company's entire operated system (Ex. Y-3).

tory served or the existence or possibility of competitive transportation agencies therein, nor of developments or trends or prospects in the art, or in that territory. There was no testimony as to what future developments might be expected or how they would affect the character, volume or profitableness of respondent's enterprise.

Respondent apparently based its case upon the assumption that it had been damaged and that the only question to be decided was the *amount* recoverable. Its "proof" of the *fact* of damage consisted solely in showing that the lease had been rejected and that current earnings of the property were less than the rent reserved.

In presenting certain computations based on past earnings its counsel said:

> "I propose to submit a whole series of ratios and a whole series of periods, so that the court can choose whatever he wants, whatever he thinks fair" (R. 109).
>
> "I do not say it is correct, but I say that this is an interesting fact which the trier of fact might take into consideration. And I want it to go into evidence, not as absolute proof of anything, but as an interesting fact which the trier of fact may take into consideration if he thinks it is of any importance" (R. 110).
>
> "I am not making forecasts. I am leaving it to the court to make them" (R. 139).

Its theory is further illustrated in the following language from its trial brief quoted in the District Judge's opinion:

> "The past is the only criterion of the future that there is; and the production of experts to relieve one from the pains of thought in this regard is not really useful" (R. 276).

Commenting on the absence of expert testimony the trial judge said:

> "I quite agree that the bare opinion of one posing as an expert on future rental value would be of little help to the court in connection with its present task. But on the other hand, it is conceivable that the court might have been considerably assisted by a broad, sound survey by an expert of demonstrated competence covering the field of passenger transportation by bus in the relevant territory and contiguous regions; including perhaps such factors as industrial and residential developments, past and future; the growth, volume and earnings of bus traffic, both in the relevant territory and similar territories; the existence and condition of competitive agencies; and the possibilities and effects of consolidation with other combinations of capital in the general field. I cannot now say that any such survey would have sufficed as a sole base for the assessment of damages. I think, however, some such survey might have constituted a firmer base than anything contained in the record" (R. 276-277).

Even as to "the past" respondent's showing was limited to the earnings and estimated earnings of the property averaged for five different periods all of them ending with December 31, 1938, and none of them extending further back than 1924. These averages were then projected for 37 years into the future after making certain additions* to prospective earnings on the basis of this Court's

* The District Court pointed out that the petitioners claim that the additions should be greater than those proposed by respondent, but made no finding on the matter because "the contest between the parties over this item is moot under my view of the controlling issues" (R. 273, footnote). The Circuit Court of Appeals made no reference to this matter.

ruling that the sinking funds which came into respondent's possession on termination of the lease would increase the earning power of the property (305 U. S., p. 505).

The five periods for which averages of past earnings were computed included, respectively, fifteen years (Exs. X2 and X6), eighteen months (Ex. X2A), three years (Ex. X2B), ten years (Ex. X2C) and fourteen years (Ex. X2D). No use was made by respondent of earnings of the years prior to 1924. The fifteen year average was shown to be based on erroneous estimates and was disregarded by both the lower courts.

The trial judge's findings with regard to the eighteen month average were as follows:

> "I hold that the earnings for the eighteen months of bus operation ending in December, 1938 is inadequate as a base for finding future rental value.
>
> "In 1936 when operation of the demised property was in substantial part by trolley, the net operating income was $246,000. In 1938, the first full calendar year of 100% bus operation, the earnings were only $121,000. There is no evidence to show whether this shrinkage was due to a general recession in business conditions or to an error in judgment in changing from trolley to bus operations. Either cause destroys the validity of this period as a base upon which damages may be computed" (R. 273).

With regard to the three year average the judge said:

> "I hold that the earnings for the years 1936-1938 are inadequate as a base. During half of this period, operations were in substantial part by trolley. I agree with claimant's counsel that this period, as an experience period, is thereby 'perturbed by irrelevant or inaccurate factors.' Moreover, this period also was one of economic depression" (R. 274).

As to all the longer periods the judge said:

> "And I hold that all earlier periods concerning which there is evidence are unsuitable for use as experience periods. They are irrelevant in that they cover operation in large part by trolley. They are speculative in that there is no evidence from which the relative frequency of the fat years and the lean can be forecast. * * *
>
> "Predictions on such scant data are not even 'plausible anticipations' which the Supreme Court has said are not enough. Especially is that so in a case such as this where after thirty years of trolley operation, the claimant itself after repossession wholly abandoned trolley operation for bus operation and on its brief urges that only results on the new basis (of eighteen months) are not 'perturbed by irrelevant or inaccurate factors' resulting from superseded trolley operations" (R. 274-5).

The court not only ruled that the evidence was insufficient to warrant recovery for the entire unexpired term, but, by necessary inference,* that it would not support damages even for a portion of the term.

The Circuit Court of Appeals disregarded these findings and proceeded to select from among the several averages of past earnings as computed by respondent that which in its opinion

> "furnished a more reliable indication of future earnings than any of the others" (R. 299).

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* "I hold, however, that *even if claimant had been able to prove* such a history or prospect of earnings for the demised premises as would support an assessment of *damages for an unexpired term of say, forty years,* that proof standing alone would not necessarily be adequate to support an assessment for the unexpired term of 969 years * * *" (R. 277). (Italics ours.)

It did not expressly overrule the lower court's holdings that this evidence was inadequate to show rental value, but merely found that it was "enough to serve as an *approximate* measure of earnings for some years to come" (R. 299, italics supplied). We submit that this falls far short of holding that the evidence shows damages "to reasonable certainty" or "satisfies the mind".

The reason assigned for considering the fourteen year average "more reliable" than the others was that

> "it had the great merit of covering ups as well as downs in the general economic conditions which the shorter periods did not do" (R. 299).

The years were 1925 through 1938. While, therefore, they did include some "ups", they included a much larger proportion of "downs". They embraced the depression from its very beginning, but only a part of the preceding era of prosperity. A period which does not include even one complete economic cycle cannot be considered a reliable base for forecasting even so small a part of the remainder of the term as the next eight years.

But even if it had, as we have said, the record contains no evidence as to whether conditions in the industry or the territory are now, or are likely to be, sufficiently similar to those during the past fourteen years to permit of such a forecast. In apparent recognition of the necessity for such a showing the Circuit Court of Appeals said that it had

> "in mind the character of the property, the territory served, the history of operations down to the time of the trial, the general economic conditions under which past operations have been conducted, and the other factors in the case" (R. 300).

It is apparent from the record that practically all of this background must have been supplied through judi-

cial knowledge, unsupported by evidence and not explained or qualified by the advice of any expert. From the record, all that the appellate judges could have known of the character of the property was simply that it was trolleys which were gradually being converted into busses. Of the territory served, they had, of course, the familiarity of well-informed citizens, certainly no greater knowledge than that of Judge Hincks, who lives there. Of the history of operations, they had nothing except net earnings. Of the general economic conditions, again, they had no more than the knowledge of any well-informed persons, for they were offered nothing else (R. 109-139).

We submit that that was not enough to enable the Circuit Court of Appeals to do what it undertook to do, namely, to exercise "an informed and reasoned judgment on the probable earnings in the future" (R. 300). The Court did not have even the amount of information and advice which any business man would demand before exercising such judgment in the making of a lease. And in the making of leases certainty is not required and seldom attainable. Guess-work and horse trading are neither unknown nor illegal. In fixing damages under Section 77 they are forbidden.

The respondent's only other suggestion as to future rental value—it can hardly be called evidence, and the Circuit Court of Appeals did not even mention it,—was that the Public Utilities Commission of Connecticut would probably not permit more than 6½% to be earned on the value of the property. The value which respondent proposed to use for purposes of this argument was as of the end of 1938 (R. 209). 6½% on that value would, it was contended, constitute a probable ceiling beyond which public regulation would not permit earnings to go.

This is, of course, a mere assertion. Even if otherwise

accurate it is not, and could not be, evidence of future earnings or of rental value. The Circuit Court of Appeals ignored it and the District Court rejected it (R. 280-1). Moreover, the value base which the respondent used is not tenable. It was an appraisal of the properties after they had been in the control of the respondent for over two years and after a substantial part of them had been abandoned and all had been converted from trolleys into busses (R. 209). If this theory had any validity, the value to be considered would of course have to be that at the time of rejection. The only evidence of the value at that time is the book value of about $31,000,000 (R. 160-1). 6½% on any such sum as that would far exceed the rent reserved.

Even if there had been sufficient evidence of rental value of the physical property to warrant the Circuit Court of Appeals in reversing the District Court's findings on that subject, the record is devoid of findings on another element* necessary to the determination of damages. We have already referred to the controversy and lack of findings as to the amount to be added to post-rejection earnings on account of respondent's acquisition of the sinking funds on termination of the lease. The Circuit Court of Appeals appears to have adopted respondent's contention, though it did not discuss or, so far as its opinion discloses, even consider petitioner's evidence and argument and it made no finding on the subject except such as is implied in its use of one of respondent's ex-

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* As the trial court dismissed the claim for lack of proof of rental value, no findings were required as to future rent or discount rate (R. 268, 270). The Circuit Court of Appeals, in computing damages up to 1946, apparently adopted the 4% discount rate suggested by respondent. Its opinion, however, contains no finding or discussion of either that subject or future rent. This Court has noted the future reduction in rental provided for in the lease (305 U. S. p. 495).

hibits* in computing damages. Nor, so far as appears, did it consider the earnings history of the leased properties prior to 1925, when the proportion of depression to prosperity was very much less than during the fourteen subsequent years (R. 197-200 and Exhs. Y3 and Y4). Consequently, it erred not only in reversing the District Court's judgment but in failing to take into account all of the elements which should have gone into a computation of damages.

* * *

We therefore submit that the trial court was right; there was not enough evidence to satisfy the requirement of reasonable certainty; and the Circuit Court of Appeals erred in awarding damages for any part of the unexpired term.

We respectfully ask this Court to reverse the judgment of the Circuit Court of Appeals and to direct it to affirm the decision of the District Court.

Respectfully submitted,

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HERMON J. WELLS,
Counsel for Petitioners.

October 4, 1940.

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* It is not apparent how the sum of $4,411,837.61 was arrived at by the Circuit Court of Appeals. Presumably it was based on Respondent's Exhibit X-2D, which uses the fourteen-year average. That exhibit was shown to contain certain errors and to omit certain originally controversial revenues (R. 192-195). We have been unable to check the computation mathematically from any figures in the record. Consequently we cannot tell whether or not proper allowances were made for the errors contained in the exhibit.